showed need to fill applicant's position of high school secretary/principal's secretary/athletic secretary and have someone perform her duties, defendant showed high school where applicant had worked was saddled with debt, slated for closure absent fiscal turnaround, and surviving only through subsidies from defendant, and defendant showed impact of extending applicant's leave at high school where she had worked; WCAB held defendant need not provide evidence of archdiocese's overall financial resources as opposed to those of high school where applicant had worked, Labor Code § 132a cannot prohibit defendant from making responsible business decisions "just because it can afford to lose money," and defendant's need to maintain essential business operations is business reality. Kincaid v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1490; 67 Cal. Comp. Cases 1211 (Cal. App. 2nd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[2][b].]

WCAB held applicant did not prove defendant violated Labor Code § 132a by not returning him to work on 2/6/2001, following industrial left knee injury, when WCAB found defendant had business realities defense/reasonable good faith belief that applicant could not perform all duties of ramp serviceperson or lead ramp serviceperson, because of restrictions imposed by two physicians. Byron Savage v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1576; 67 Cal. Comp. Cases 1513 (Cal. App. 1st Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 4.65[2], 10.11[1], [2][b], [3][a].]

WCAB found defendant's termination of applicant after he sustained three industrial injuries did not violate Labor Code § 132a, was not discriminatory, and was necessitated by business realities, in that (1) medical evidence indicated applicant with back and other injuries could not perform majority of duties as school custodian (including bending, lifting, pushing, and pulling), (2) business reality was employer's fear that applicant would re-injure himself, as in past, if he returned to pre-injury job, (3) no alternate light-duty jobs were available with defendant, and (4) defendant offered applicant vocational rehabilitation services. Sedano v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4966; 66 Cal. Comp. Cases 544 (Cal. App. 4th Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[2][b].]

Discrimination--Labor Code § 132a--Collateral Estoppel:

WCAB held applicant's claim that employer discriminated against her in violation of Labor Code § 132a was not barred by collateral estoppel doctrine because of arbitration decision reached under collective bargaining agreement between employer and applicant's union, when WCAB was not persuaded that collective bargaining agreement clearly provided for binding arbitration of applicant's Labor Code § 132a claim, and that arbitration was conducted to allow for full litigation and fair adjudication of applicant's Labor Code § 132a claim. Anheuser-Busch, Inc. v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1569; 67 Cal. Comp. Cases 1483 (Cal. App. 2nd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.08[2][c]-[d].]

Discrimination--Labor Code § 132a--Damages:

WCAB awarded applicant damages due to defendant's Labor Code § 132a violation (termination) by awarding applicant back pay on wage loss basis for two periods after termination: (1) for 25 hours per week during period between date of discrimination and date applicant's treating physician released her to return to full-time work, with restrictions, and (2) for 40 hours per week for period after physician's release to return to work, although WCAB excluded periods of time when applicant was in India and not available to work and when applicant was receiving temporary disability, WCAB calculated applicant's average weekly wages using agreed upon amount from compromise and release for same industrial injury of 4/29/97 and adding four-percent annual merit increase, and WCAB found applicant adequately mitigated her damages during periods when back pay was ordered by looking for work during those periods. J.C. Penney Co. v. Workers' Compensation Appeals Bd., 2005 Cal. Wrk. Comp. LEXIS 192; 70 Cal. Comp. Cases 1032 (Cal. App. 1st Dist. 2005) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]-[3].]

Discrimination--Labor Code § 132a--Employment Relationship:

Court of Appeal held applicant had no employment relationship with defendant at time defendant refused to rehire him after he had quit, Labor Code § 132a did not apply because there was no employment relationship, and Labor Code § 3357 presumption of employee status did not apply.

Roebbelen Constr., Inc. v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4857; 66 Cal. Comp. Cases 235 (Cal. App. 3rd Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.65[2], 10.11[1].]

Discrimination--Labor Code § 132a--ERISA Preemption:

WCAB en banc held applicant's Labor Code § 132a claim "related to" ERISA plan and was preempted by ERISA (29 U.S.C.S. § 1144(a)), when employer terminated contributions to ERISA group health benefits pursuant to ERISA plan after applicant was off work for more than 90 days due to industrial injuries and applicant claimed termination of benefits was Labor Code § 132a discrimination. Navarro v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1219; 67 Cal. Comp. Cases 145 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 1.03, 4.65[2], 10.11[1].]

Even if applicant had been newly aggrieved by WCAB en banc's prior (February 13, 2002) decision, WCAB en banc would have denied instant petition on the merits, holding that applicant's Labor Code § 132a claim "related to" ERISA plan and was preempted by ERISA (29 U.S.C.S. § 1144(a)), when employer terminated contributions to ERISA group health benefits pursuant to ERISA plan after applicant was off work for more than 90 days to industrial injuries and applicant claimed termination of benefits was discriminatory under Labor Code § 132a. Navarro v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1258; 67 Cal. Comp. Cases 296 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 1.03, 4.65[2], 10.11[1].]

ERISA did not preempt WCAB finding that defendant violated Labor Code § 132a. Delta Air Lines, Inc. v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4906; 66 Cal. Comp. Cases 389 (Cal. App. 2nd Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.65 [2], 10.11[1].]

Discrimination--Labor Code § 132a--Federal Pre-emption

WCAB held that applicant was not required to file grievance under federal Labor Relations Management Act or exhaust remedies in other forums before filing Labor Code § 132a claim. Roadway Express, Inc. v. Workers' Compensation Appeals Bd., 2006 Cal. Wrk. Comp. LEXIS 369; 71 Cal. Comp. Cas 1618 (Cal. App. 6th Dist. 2006). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 10.11[1], [2][a], 21.07[7].]

WCAB held Labor Management Relations Act (29 U.S.C.S. § 185(a)) did not preempt WCAB's jurisdiction to decide Labor Code § 132a claim, based on Judson Steel v. W.C.A.B. (Maese) (1978) 22 Cal. 3d 658 [150 Cal. Rptr. 250, 586 P.2d 572, 43 Cal. Comp. Cases 1205], despite defendant's contentions that it had applicant examined for fitness for duty under collective bargaining agreement between applicant's union and defendant and that Labor Management Relations Act's interpretations of collective bargaining agreement preempted WCAB interpretation, when WCAB found Labor Code § 132a statutory right to be free from discrimination could not be bargained away in collective bargaining agreement, pursuant to Judson Steel. Bellflower Unified School Dist. v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 742; 68 Cal. Comp. Cases 55 (Cal. App. 2nd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 21.01[1], 21.03 [2][b].]

Discrimination--Labor Code § 132a--Federal Preemption--Collective Bargaining Agreement:

WCAB held that applicant/truck driver's Labor Code § 132a claim was not preempted by federal Labor Management Relations Act and that WCAB had jurisdiction to adjudicate claim despite defendant's assertion that adjudication of claim necessitated interpretation of collective bargaining agreement, which expressly prohibited truck drivers from performing their usual work if they had any restrictions due to work-related injury, even if restriction could be reasonably accommodated, when WCAB found that it was unnecessary to interpret terms of collective bargaining agreement that allowed discrimination against employees with work-related injuries contrary to state law, that applicant's rights under Labor Code § 132a existed independently of collective bargaining agreement, and that neither defendant nor union had power to exempt its actions from state law based on collective bargaining agreement. Roadway Express, Inc. v. Workers' Compensation Appeals Bd., 2006 Cal. Wrk. Comp. LEXIS 180; 71 Cal. Comp. Cas 864 (Cal. App. 6th Dist. 2006). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.04[1], 21.01[1], 21.03[2][b].]

Discrimination--Labor Code § 132a--Investigation of Workers' Compensation Claim:

WCAB found that applicant failed to meet burden of showing that defendant violated Labor Code § 132a by obtaining his Department of Motor Vehicles records to determine whether he was in car accident, when defendant was entitled and required to conduct thorough investigation of applicant's claim and applicant's Labor Code § 132a petition was defective under 8 Cal. Code Reg. § 10109. Mansilla v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 5122; 66 Cal. Comp. Cases 937 (Cal. App. 5th Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[2][a], [4], 25.05[5].]

Discrimination--Labor Code § 132a--Laches:

Court of Appeal held defendant did not meet burden of proving prejudice from applicant's delay in prosecuting her Labor Code § 132a discrimination claim, when Court of Appeal found applicant filed claim in 1994 related to 1992 industrial injury, parties took various actions until 1995, applicant did not prosecute claim between 1995 and 2001, defendant raised laches defense, which required defendant to prove elements of delay and prejudice, and defendant did not present any evidence on how it was prejudiced by applicant's delay in prosecuting claim. Brainard v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 221; 68 Cal. Comp. Cases 365 (Cal. App. 3rd Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.21[2][d].]

Discrimination--Labor Code § 132a--Lost Wages:

Court of Appeal held that applicant must prove he lost wages and that Labor Code § 132a(1) required showing that lost wages were caused by employer's termination of applicant, that applicant did not meet this burden of proof, and that applicant was not entitled to lost wages, when Court of Appeal found WCAB held employer's termination of applicant violated Labor Code § 132a, applicant was not able to return to his usual machinist work during entire period following termination because of disability from 9/28/92 industrial back injury, and applicant did not show there were light duty jobs available with defendant that he could perform with his disability. Coulter v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1444; 67 Cal. Comp. Cases 1013 (Cal. App. 2nd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 21.07[7], 24.03[10].]

Discrimination--Labor Code § 132a--Pre-Judgment Interest:

Supreme Court held WCAB should award pre-judgment interest on Labor Code § 132a awards for lost wages and work benefits, when criteria of Civil Code § 3287 are met, and award of pre-judgment interest was not precluded by Labor Code § 132a, 5800, or otherwise. Currie v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4854; 24 Cal. 4th 1109; 17 P.3d 749; 104 Cal. Rptr. 2d 392; 66 Cal. Comp. Cases 208 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.65[2], 10.11[1], 21.07[7], 24.03[10].]

Discrimination--Labor Code § 132a--Reinstatement--Probationary Employees:

WCAB ordered that defendant, who fired applicant during his probationary period in violation of Labor Code § 132a, reinstate applicant as full-time, non-probationary employee, when defendant did not meet burden of proving that applicant should be returned to work as probationary employee and WCAB found that applicant would have successfully completed his probationary period but for his unlawful termination. ARCO Products Co., PSI v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 290; 68 Cal. Comp. Cases 653 (Cal. App. 4th Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1].]

Discrimination--Labor Code § 132a--Reinstatement With Back Wages and Benefits:

WCAB held defendant violated Labor Code § 132a and awarded statutory penalty of $10,000 for applicant's termination after 11/30/99 industrial injury, but WCAB also held applicant was not entitled to reinstatement with back wages or benefits because during relevant period of time applicant was either temporarily totally disabled or qualified for, but declined, vocational rehabilitation services, as corroborated by reports from applicant and defense qualified medical examiners. Shamon v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 466; 68 Cal. Comp. Cases 1408 (Cal. App.

5th Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11.]

Discrimination--Labor Code § 132a--Reinstatement With Back Wages and Benefits--Due Process:

WCAB found no denial of applicant's due process rights when all issues related to applicant's claim that defendant violated Labor Code § 132a were tried and applicant had opportunity to present evidence on all issues, and WCAB found as matter of law that applicant was not entitled to recovery on issue of back wages and benefits, obviating need for further proceedings. Shamon v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 466; 68 Cal. Comp. Cases 1408 (Cal. App. 5th Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11.]

Discrimination--Labor Code § 132a--Time to File Petition:

WCAB found that applicant's Petition for Benefits under Labor Code § 132a, which was based on her termination from employment, was not timely filed, when applicant was terminated on 11/5/98 but did not file Petition until 11/17/99, more than one year after her date of termination; WCAB found no merit to applicant's contention that her termination date was 11/23/98, date on which she had exhausted her appeals process within defendant's organization, and held that date of termination was 11/5/98, which was date termination actually occurred. Jackson v. Workers' Compensation Appeals Bd., 2004 Cal. Wrk. Comp. LEXIS 226; 69 Cal. Comp. Cases 1035 (Cal. App. 2nd Dist. 2004) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[4].]

Discrimination--Labor Code § 132a--Wage Loss:

WCAB awarded applicant lost wages, including overtime, and benefits pursuant to Labor Code § 132a, when it found that (1) applicant proved his lost wages were due to defendant's failure to return him to his usual work as truck driver, forcing him to mitigate his damages by taking modified work for lower pay, and (2) applicant proved he would have earned overtime during period he was not allowed to return to work as driver, by showing that his usual work included significant overtime. Roadway Express, Inc. v. Workers' Compensation Appeals Bd., 2006 Cal. Wrk. Comp. LEXIS 180; 71 Cal. Comp. Cas 864 (Cal. App. 6th Dist. 2006). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1].]

Evidence--Witnesses--Exclusions:

WCAB excluded defense witnesses who were not present at time set for trial of applicant's Labor Code § 132a petition, when witnesses were employer representatives, trial date was set at earlier mandatory settlement conference, defendant did not object to trial date or request continuance, defendant entered incorrect trial date on his calendars, defendant did not make offer of proof of content of witnesses' testimony, and WCJ denied defendant's request for 15 to 20 minute delay of trial to wait for witnesses. Sacramento City Unified School Dist. v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1493; 67 Cal. Comp. Cases 1225 (Cal. App. 3rd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 26.02[3], 26.03[1], 26.05[3], 26.06[3].]

Fair Employment and Housing Act--Industrial Disabilities:

WCAB found that requirements of Fair Employment and Housing Act (FEHA) apply to disabilities arising from industrial injuries, that Labor Code § 132a is not exclusive remedy for such injuries, and that Government Code § 12940(n) requirement that employer engage in timely, good-faith, interactive process with employee to determine effective reasonable accommodations does not impose on employer duty to have personal meeting with employee and that telephone communications over period of time between employer and employee were sufficient to satisfy Government Code § 12940(n) requirement. Atkins v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 545; 68 Cal. Comp. Cases 1690 (Cal. App. 2nd Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 10.60[4], 11.05[4], 21.03[2][d], 21.07[7], 35.104.]

Penalties--Unreasonable Delay:

Court of Appeal held that, for employer to establish that delay in paying Labor Code § 132a award

was not unreasonable based on employer's alleged financial incapacity to pay award, employer must establish it had financial incapacity during entire period of delay due to legitimate business expenses or explain why available funds could not be used by it to pay award; Court of Appeal held there was no substantial evidence that employer made such a showing of financial ncapacity to pay award in question. Deakin v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1253; 67 Cal. Comp. Cases 229 (Cal. App. 3rd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[3][a], [c].]

Penalties--Unreasonable Delay--Multiple Penalties:

WCAB found four separate and distinct acts of unreasonable delay and awarded four Labor Code § 5814 penalties, when defendant unreasonably delayed (1) paying lost wages and benefits pursuant to prior findings and award that found defendant had violated Labor Code § 132a, (2) providing accounting of benefits due applicant, (3) paying benefits by failing to follow applicant's signed waiver of redeposit requirement related to his retirement account, and (4) paying attorney's fees pursuant to prior findings and award. Los Angeles County Fire Dep't, PSI v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4903; 66 Cal. Comp. Cases 380 (Cal. App. 2nd Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[3][c].]

Petitions for Reconsideration--Successive Petitions:

WCAB en banc dismissed applicant's second petition for reconsideration as impermissible successive petition, when WCAB found issue raised (whether applicant's Labor Code § 132a claim was pre-empted by ERISA, 29 U.S.C.S. § 1001 et seq.) had been raised before mandatory settlement conference, at mandatory settlement conference, at trial, in post-trial briefs, and in applicant's first petition for reconsideration, and WCAB did not consider new evidence or new theories between WCJ's findings and its decision on applicant's first petition for reconsideration; alternatively, on merits, WCAB would again find applicant's claim that defendant violated Labor Code § 132a pre-empted by ERISA. Navarro v. Workers' Compensation Appeals Bd., 2002 Cal. Wrk. Comp. LEXIS 1537; 67 Cal. Comp. Cases 1364 (Cal. App. 2nd Dist. 2002) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 23.14[2][o], 28.30-28.36.]

Petitions for Removal--WCAB's Continuing Jurisdiction--Reopening of Awards--Final Decisions:

WCAB removed case to itself under Labor Code § 5310 and held that it had no jurisdiction to conduct further proceedings related to applicant's new or previously raised contentions about previous WCAB final decisions on various subjects (including permanent disability, medical benefits, vocational rehabilitation benefits, Labor Code § 132a discrimination, reopening 1979 injury case, and tolling statute of limitations due to old WCAB file being destroyed under 8 Cal. Code Reg. § 10758), and WCAB ordered staff of district office of WCAB not to accept further filings from applicant or schedule further proceedings, unless applicant obtained permission from district office presiding WCJ. Walmsley v. Workers' Compensation Appeals Bd., 2006 Cal. Wrk. Comp. LEXIS 181; 71 Cal. Comp. Cas 872 (Cal. App. 1st Dist. 2006). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][f], 26.03[4], 28.03[1][a].]

Preemption--Labor Code § 132a:

ERISA did not preempt WCAB finding Labor Code § 132a violation when WCAB decision did not depend on interpretation of collective bargaining agreement. Argonaut Constructors v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4861; 66 Cal. Comp. Cases 255 (Cal. App. 1st Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 1.03, 4.65[2], 10.11[1].]

Pre-Judgment Interest--Date of Accrual:

Pre-judgment interest on Labor Code § 132a award for lost wages and work benefits accrued from date such wages and benefits would have become due absent employer's conduct that violated Labor Code § 132a (here, discriminatory conduct was employer's refusal to reinstate applicant after applicant's treater released him to return to work without restrictions). Currie v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 4854; 24 Cal. 4th 1109; 17 P.3d 749; 104

Cal. Rptr. 2d 392; 66 Cal. Comp. Cases 208 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.65[2], 10.11[1], 21.07[7], 24.03[10].]

WCAB Decisions--Sufficiency:

Court of Appeal held WCAB failed to give WCJ's findings great weight to which they are entitled and failed to identify evidence of considerable substantiality that would support finding contrary to WCJ's finding that employer's termination of applicant was not violation of Labor Code § 132a. Santa Barbara Cottage Hosp. v. Workers' Compensation Appeals Bd., 2001 Cal. Wrk. Comp. LEXIS 5317; 66 Cal. Comp. Cases 1484 (Cal. App. 2nd Dist. 2001) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.36[2][d].]

WCAB Jurisdiction--Collective Bargaining Agreements--Labor Code § 132a:

WCAB lacked subject matter jurisdiction over applicant's Labor Code § 132a claim, under which applicant alleged that he was wrongfully denied his seniority rights to return to work after his industrial injury, when determination of applicant's seniority rights was dependent on interpretation of collective bargaining agreement between applicant's employer and union, and WCAB found that interpretation of collective bargaining agreement was preempted by Federal Railway Labor Act. McFadden v. Workers' Compensation Appeals Bd., 2005 Cal. Wrk. Comp. LEXIS 208; 70 Cal. Comp. Cases 1180 (Cal. App. 4th Dist. 2005) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 1.04, 10.11[1], 21.01[3].]

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WCAB Jurisdiction--Discrimination--Labor Code-§ 132a:

WCAB held it had jurisdiction to resolve applicant's Labor Code § 132a claim, not arbitrator under "carve out" alternative dispute resolution system created by defendant under Labor Code § 3201.5, when WCAB found Labor Code § 3201.5 alternative dispute resolution systems applied to disputes under Division 4 of workers' compensation statute, but Labor Code § 132a disputes were under Division 1 of workers' compensation statute. Kiewit Pacific Co. v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 573; 68 Cal. Comp. Cases 1873 (Cal. App. 4th Dist. 2003) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 1.04, 10.01, 33.01-33.04.]

WCAB Jurisdiction--Tribal Sovereign Immunity--Waiver:

Court of Appeal, denying applicant's petition for writ of review, held that WCAB had no jurisdiction over applicant's Labor Code § 132a discrimination claim because defendant Indian tribe had not clearly, expressly, and unequivocally waived its tribal sovereign immunity with respect to applicant, who worked as surveillance agent at tribe's casino, when Court of Appeal found that tribe, in its compact with state of California allowing it to operate casino, had waived its sovereign immunity with respect to only its "gaming operation," that tribe's gaming operation casino was separate entity from tribe's government, that each employee worked for one or other, but not both, and that applicant worked for tribal government, not gaming operation casino. Sullivan v. Workers' Compensation Appeals Bd., 2006 Cal. Wrk. Comp. LEXIS 281; 71 Cal. Comp. Cas 1065 (Cal. App. 5th Dist. 2006). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.02[2].]

WCAB Powers:

WCAB would not substitute its own business judgment for that of governmental entity regarding entity's allocation of its limited financial resources, in making determination as to whether entity met "business realities" defense under Labor Code § 132a. Abratte v. Workers' Compensation Appeals Bd., 2003 Cal. Wrk. Comp. LEXIS 230; 68 Cal. Comp. Cases 451 (Cal. App. 2nd Dist. 2003) [See generally

Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § § 1.11[6], 10.11[2][b].]

Suggested Forms:

Notice to Employer of Injured Employee's Discrimination Claim

Service: **Get by LEXSTAT®**
TOC: Deering's California Code Annotated > / . . . / > Chapter 5. Division of Workers' Compensation > **§ 132a. Policy opposed to discrimination against injured workers; Misdemeanor offenses**
Citation: **cal lab. code 132a**
View: Full
Date/Time: Thursday, March 13, 2008 - 11:36 AM EDT

*30 Cal. 4th 1281, *; 70 P.3d 1076, **;*
*135 Cal. Rptr. 2d 665, ***; 2003 Cal. LEXIS 4198*

DEPARTMENT OF REHABILITATION et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and RONALD **LAUHER,** Respondents.

No. S100557.

SUPREME COURT OF CALIFORNIA

30 Cal. 4th 1281; 70 P.3d 1076; 135 Cal. Rptr. 2d 665; 2003 Cal. LEXIS 4198; 68 Cal. Comp. Cas 831; 20 I.E.R. Cas. (BNA) 110; 2003 Cal. Daily Op. Service 5614; 2003 Daily Journal DAR 7051

June 26, 2003, Decided
June 26, 2003, Filed

PRIOR HISTORY: D035665. WCAB No. S DO189011.
State Dept. of Rehab. v. Workers' Comp. Appeals Bd., 2001 Cal. LEXIS 7493 (Cal., Oct. 24, 2001)

DISPOSITION: The decision of the Court of Appeal annulling the decision of the Board is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent claimant sought reimbursement for sick and vacation leave petitioner employer docked him for time he spent seeing a doctor for post-stipulation treatment. Respondent California Workers' Compensation Appeals Board, inter alia, ordered the employer to pay the claimant $ 10,000 for violating Cal. Lab. Code § 132a. The California Court of Appeal annulled the Board's decision. The instant court granted the claimant's petition for review.

OVERVIEW: The claimant argued that as a necessary means to the end of ensuring prompt medical treatment pursuant to Cal. Lab. Code § 4600, he was entitled to temporary total disability indemnity for the time lost from work while attending necessary medical treatment. The instant court concluded that because the claimant's industrial injury had become permanent and stationary, he was no longer entitled to receive temporary disability indemnity (TDI). That the claimant's industrial injury was permanent and stationary was undisputed. That the claimant had returned to work was also undisputed. Once the claimant's injury became permanent and stationary and he returned to work, he was no longer entitled to TDI. Because the claimant did not allege that other employees were permitted to be away from their workplace for medical care yet need not use their sick leave if they wished to be paid their full salaries, the instant court concluded that the claimant failed to demonstrate he was the victim of discrimination within the meaning of Cal. Lab. Code § 132a.

OUTCOME: The decision of the court of appeal annulling the decision of the Board was affirmed.

CORE TERMS: workers' compensation, disability, stationary, medical treatment, temporary, industrial injury, injured worker, disability indemnity, replacement, sick leave, injured employee, transportation, administrative director, appointments, obligation to pay, returns to work, compensate, disabled, liberally construed, lost wages, reimbursement, healing, appeals board,

medical evaluation, vacation time, prima facie case, workplace, attendir g, pursuing, vacation

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Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN1 The theory of workers' compensation legislation is that the risk of injury to workmen in the industries governed by the law should be borne by the industries, rather than by the individual workman alone. As the ultimate result, the burden imposed in the first instance upon the employer, will, it is said, be distributed, as part of the cost of production, among the consuming public. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Civil Procedure > Appeals > Standards of Review > De Novo Review

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview

HN2 Once an injured worker is awarded compensation for an industrial injury and that award is affirmed by the California Workers' Compensation Appeals Board, the reviewing court's review of that decision is limited. As to findings of fact, the reviewing court defers to the Board's findings if supported by substantial evidence. Cal. Lab. Code § 5952. While the reviewing court accords "significant respect" to the Board's interpretation of statutes in the area of workers' compensation, it subjects the Board's conclusions of law to de novo review. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN3 See Cal. Lab. Code § 5952. *Shepardize:* Restrict By Headnote

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN4 The legislature, by enacting Cal. Lab. Code § 3202, has helped frame the issue of review by an appellate court. That section provides that issues of compensation for injured workers shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. Thus, although the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the California Workers' Compensation Act must be liberally construed in the employee's favor, and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. This rule is binding upon the California Workers' Compensation Appeals Board and the reviewing court. Moreover, whether an employee's injury arose out of his employment is not the only question subject to this rule. All aspects of workers' compensation law are to be liberally construed in favor of the injured worker. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

Workers' Compensation & SSDI > Benefit Determinations > Temporary Partial Disabilities

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN5 Two of the types of benefits available to the worker injured on the job are temporary disability indemnity, or TDI, and permanent disability indemnity, or PDI. Although both take the form of financial benefits, it must be remembered that temporary disability indemnity and permanent disability indemnity were intended by the legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Temporary Partial Disabilities

HN6 That temporary disability indemnity (TDI) is intended as wage replacement is inferable from Cal. Lab. Code § 4653, which requires temporary total disability be calculated as two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market. Because TDI is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income, an employer's obligation to pay TDI to an injured worker ceases when such replacement income is no longer needed. Thus, the obligation to pay TDI ends when the injured employee either returns to work or is deemed able to return to work, or when the employee's medical condition achieves permanent and stationary status. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Vicarious Liability > Employers > Indemnity

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN7 Cal. Lab. Code § 4650 provides that the first permanent disability payment must be made by the employer within 14 days after the date of the last payment of temporary disability indemnity. From this, the reviewing court may infer the legislature anticipates an employer has no legal obligation to pay permanent disability indemnity until the obligation to pay temporary disability indemnity has ceased. Accordingly, the right to permanent disability compensation does not arise until the injured worker's condition becomes "permanent and stationary." A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN8 The right to permanent disability compensation does not arise until the injured worker's condition becomes "permanent and stationary." A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

Workers' Compensation & SSDI > Benefit Determinations > Temporary Partial Disabilities

HN9 An injured employee cannot be temporarily and permanently disabled at the same time; thus, permanent disability payments do not begin until temporary disability payments cease. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN10 See Cal. Lab. Code § 129(a). *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN11 See Cal. Lab. Code § 129.5(a). *Shepardize:* Restrict By Headnote

Administrative Law > Agency Rulemaking > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN12 Cal. Lab. Code § 129.5(b) requires the California Labor Department's administrative director to promulgate regulations establishing a schedule of violations and the amount of the administrative penalty to be imposed for each type of violation. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN13 See Cal. Code Regs. tit. 8, § 10111.1(a)(4).

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

Workers' Compensation & SSDI > Benefit Determinations > Temporary Partial Disabilities

HN14 Although Cal. Lab. Code § 4600 specifically provides for payment of transportation

expenses and temporary disability when the evaluation is performed at the request of, for example, the employer or the employer's insurer, neither this clause of Cal. Code Regs. tit. 8, § 10111.1(a)(4), nor Cal. Lab. Code § 4600 authorizes temporary disability indemnity or wage replacement where an employee seeks medical treatment for a permanent injury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN15 Cal. Code Regs. tit. 8, § 10111.1(a)(4), prescribes a penalty for the failure to object or pay the injured worker for any other transportation, temporary disability, meal or lodging expense incurred to obtain medical treatment or evaluation, within 60 days of receiving a request. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > De Novo Review

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN16 The California Supreme Court finds no authority for the proposition that an injured worker is entitled to payment of temporary disability indemnity (TDI) to reimburse him for wages lost while pursuing medical treatment for an industrial injury once that injury has become permanent and stationary. On the contrary, once the employee's injury is permanent and stationary and the employee returns to work, he is no longer entitled to TDI. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

HN17 See Cal. Lab. Code § 132a. *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Civil Procedure > Appeals > Standards of Review > De Novo Review

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

HN18 To warrant an award pursuant to Cal. Lab. Code § 132a, the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer. The employee must establish discrimination by a preponderance of the evidence, at which point the burden shifts to the employer to establish an affirmative defense. Although the reviewing court defers to the California Workers' Compensation Appeals Board's determination of facts if supported by substantial evidence, the reviewing court reviews the Board's legal decisions de novo, for it is for the court to decide whether the facts found by the Board constitute a violation of § 132a. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Discrimination > Actionable Discrimination

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN19 Under the express terms of Cal. Lab. Code § 132a, an employer may not discharge or threaten to discharge an employee because he has filed a claim for compensation. Moreover, citing § 132a's prefatory statement that it is the declared policy of the State of California that there should not be discrimination against workers who are injured in the course and scope of their employment, the California Supreme Court has explained that the type of discriminatory actions subject to penalty under § 132a is not limited to those enumerated in the statute. Instead, the state supreme court has interpreted § 132a liberally to achieve the goal of preventing discrimination against workers injured on the job. However, § 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available. More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

HN20 An employer does not necessarily engage in "discrimination" prohibited by Cal. Lab. Code § 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting "discrimination" in § 132a, the California Supreme

Court assumes the legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim. More Like This Headnote | *Shepardize*: Restrict By Headnote

HEADNOTES / SYLLABUS

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SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

An injured worker, who had returned to work following a determination that the injury had become permanent and stationary, filed a petition seeking reimbursement for the sick leave and vacation leave his employer docked him for the time he spent seeing his doctor for treatment, as well as penalties for discrimination pursuant to Lab. Code, § 132a (discrimination against workers' compensation claimants). The workers' compensation judge ordered the employer to pay a penalty of 10 percent of the cost of medical treatment, and also ordered the employer to pay the employee $ 10,000 for violating § 132a. The Workers' Compensation Appeals Board affirmed. The Court of Appeal, Fourth Dist., Div. One, No. D035665, annulled the board's decision, finding that the employee had not met his burden of presenting a prima facie case of discrimination under § 132a.

The Supreme Court affirmed the decision of the Court of Appeal. The court held that the employee was not entitled to temporary disability indemnity (TDI) to compensate him for time off from work while pursuing continuing medical treatment for that permanent injury. Since TDI is intended primarily to substitute for the worker's lost wages, an employer's obligation to pay TDI to an injured worker ceases when such replacement income is no longer needed. Thus, the obligation to pay TDI ends when the injured employee either returns to work or is deemed able to return to work, or when the employee's medical condition achieves permanent and stationary status. In this case, the employee had passed from the healing period (for which TDI serves as a wage replacement) and had agreed to a stipulation compensating him for his diminished ability in the workplace due to a permanent and stationary injury. Because the employee had begun collecting permanent disability indemnity, he was no longer entitled to TDI. The court further held that the employer did not discriminate against the employee within the meaning of Lab. Code, § 132a, by requiring the claimant to use sick leave and vacation leave when away from the workplace seeking treatment for his permanent injury. Since the employee did not allege that other employees were permitted to be away from their workplace for medical care and did not have to use their sick leave if they wished to be paid their full salaries, he failed to demonstrate he was the victim of discrimination within the meaning of § 132a. (Opinion by Werdegar, J., expressing the unanimous opinion of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

CA(1) **(1) Workers' Compensation § 3—Nature and Purpose of Workers' Compensation.** -- The theory of the workers' compensation legislation is that the risk of injury to workers in the industries governed by the law should be borne by the industries, rather than by the individual worker alone. As the ultimate result, the burden imposed in the first instance upon the employer, will be distributed, as part of the cost of production, among the consuming public. This system attempts to assure employees of an expeditious remedy both adequate and certain, independent of any fault on the part of employees and employers. At the same time, it provides the employer with a liability that is determinable within defined limits. It represents a philosophy that industry, as a cost of doing

business, should provide for the care and rehabilitation of workers disabled by work injuries. In this way, society supports the program as an integral element of commerce and industry, rather than through tax-supported plans. The purpose of an award is not to make the employee whole for the loss which he or she has suffered, but to prevent the employee and his or her dependents from becoming public charges during the period of disability. The award transfers a portion of the loss suffered by the disabled employee from the employee and his or her dependents to the consuming public. Complete protection is not afforded the employee from disability, since this would constitute an invitation to malinger or to be careless on the job, he or she would then lose nothing in assuming a disabled status.

CA(2)**(2) Workers' Compensation § 127—Judicial Review—Scope--Decision of Workers' Compensation Appeals Board.** --Once an injured worker is awarded compensation for an industrial injury and that award is affirmed by the Workers' Compensation Appeals Board, the court's review of that decision is limited. As to findings of fact, the court defer the board's findings if supported by substantial evidence. While the court accords significant respect to the board's interpretation of statutes in the area of workers' compensation, the court subjects the board's conclusions of law to de novo review. The Legislature, by enacting Lab. Code, § 3202, has helped frame the issue of review by an appellate court. That section provides that issues of compensation for injured workers shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. Thus, although the employee bears the burden of proving that the injury was sustained in the course of employment, the established legislative policy is that the Workers' Compensation Act must be liberally construed in the employee's favor, and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. This rule is binding upon the board and the court. Moreover, whether an employee's injury arose out of his or her employment is not the only question subject to this rule: All aspects of workers' compensation law are to be liberally construed in favor of the injured worker.

CA(3a)**(3a)** CA(3a)(3b)CA(3a)(3c)CA(3a)(3d)**Workers' Compensation § 105—Benefits Recoverable—By Employee—Temporary Disability Indemnity—Eligibility—Employee Who Has Returned to Work with Permanent Stationary Injury.** --An injured employee, who had returned to work following a determination that the injury had become permanent and stationary, was not entitled to temporary disability indemnity (TDI) to compensate him for time off from work while pursuing continuing medical treatment for that permanent injury. The fact that TDI is intended as wage replacement is inferable from Lab. Code, § 4653, which requires temporary total disability be calculated as two-thirds of the average weekly earnings during the period of such disability. Since TDI is intended primarily to substitute for the worker's lost wages, i.e., to maintain a steady stream of income, an employer's obligation to pay TDI to an injured worker ceases when such replacement income is no longer needed. Thus, the obligation to pay TDI ends when the injured employee either returns to work or is deemed able to return to work, or when the employee's medical condition achieves permanent and stationary status. An injured employee cannot be temporarily and permanently disabled at the same time. In this case, the employee had passed from the healing period (for which TDI serves as a wage replacement) and had agreed to a stipulation compensating him for his diminished ability in the workplace due to a permanent and stationary injury. Because the employee had begun collecting permanent disability indemnity, he was no longer entitled to TDI.

CA(4)**(4) Workers' Compensation § 2—Definitions and Distinctions—Temporary Disability Indemnity and Permanent Disability Indemnity.** --Two of the types of benefits available to the worker injured on the job are temporary disability indemnity (TDI) and permanent disability indemnity (PDI). Although both take the form of financial benefits, TDI and PDI were intended by the Legislature to serve entirely different functions. TDI serves as wage replacement during the jured worker's healing period for the industrial injury. In contrast, PDI compensates for the residual handicap or impairment of function after maximum recovery from the effects of the industrial injury have been attained. PDI serves to assist the injured worker in his or her adjustment in returning to the labor market.

CA(5)**(5) Workers' Compensation § 106—Benefits Recoverable—By Employee—Permanent Disability—When Right to Payment Arises.** --From Lab. Code, § 4650 (first permanent disability payment must be made by employer within 14 days after date of last payment of temporary disability indemnity), it can be inferred that the Legislature anticipates an employer has no legal obligation to pay permanent disability indemnity until the obligation to pay temporary disability indemnity has

ceased. Accordingly, the right to permanent disability compensation does not arise until the injured worker's condition becomes permanent and stationary. A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time.

CA(6)**(6) Workers' Compensation § 3—Nature and Purpose of Workers' Compensation.** -- The system of workers' compensation is not intended to provide full and total recompense for any and all consequences of a worker's injury, but instead represents a compromise between the interests of workers and those of employers. In compensation practice day in and day out employees are totally uncompensated for wages lost while attending to medical treatment during their work day. In exchange for that blanket coverage of compensation without regard to fault, the employee bears some of the burden.

CA(7a)**(7a)** CA(7a)(7b)CA(7a)(7c)**Workers' Compensation § 62—Compensable Injuries—Misconduct of Employer—Discrimination Against Injured Employee—Requiring Employee to Use Sick Leave and Vacation Leave When Seeking Treatment for Injury.** --An employer did not discriminate against a workers' compensation claimant within the meaning of Lab. Code, § 132a (discrimination against workers' compensation claimants), by requiring the claimant to use sick leave and vacation leave when away from the workplace seeking treatment for his permanent injury. For the claimant merely to show he suffered an industrial injury nd that he suffered some detrimental consequences as a result was insufficient to establish a prima facie case of discrimination within the meaning of § 132a. The system of workers' compensation does not provide a make-whole remedy, and an employer does not necessarily engage in discrimination prohibited by § 132a merely because it requires an employee to shoulder some of the disadvantages of his or her industrial injury. By prohibiting discrimination in § 132a, the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim. Since the claimant did not allege that other employees were permitted to be away from their workplace for medical care and did not have to use their sick leave if they wished to be paid their full salaries, he failed to demonstrate he was the victim of discrimination within the meaning of § 132a.

CA(8)**(8) Workers' Compensation § 62—Compensable Injuries—Misconduct of Employer—Discrimination Against Injured Employee—Prima Facie Case—Standard of Review.** --To warrant an award pursuant to Lab. Code, § 132a (discrimination against workers' compensation claimants), the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer. The employee must establish discrimination by a preponderance of the evidence, at which point the burden shifts to the employer to establish an affirmative defense. Although the reviewing court defers to the Workers' Compensation Appeals Board's determination of facts if supported by substantial evidence, the court reviews the board's legal decisions de novo, for it is for the court to decide whether the facts found by the board constitute a violation of § 132a.

CA(9)**(9) Workers' Compensation § 3—Nature and Purpose of Workers' Compensation.** -- The workers' compensation law is intended to award compensation for disability incurred in employment. The purpose of award is not to make the employee whole for the loss that he or she has suffered, but to prevent the employee and his or her dependents from becoming public charges during the period of disability. The purpose of workers' compensation is to rehabilitate, not to indemnify, and its intent is limited to assuring the injured worker subsistence while the employee is unable to work and to effectuate the employee's speedy rehabilitation and reentry into the labor market.

COUNSEL: Richard Kriman, Robert W. Daneri and David M. Goi for Petitioners.

Stephen D. Underwood and Teresa C. Eggemeyer for CSAC Excess Insurance Authority as Amicus Curiae on behalf of Petitioners.

Paul, Hastings, Janofsky & Walker and Paul Grossman for California Employment Law Council as Amicus Curiae on behalf of Petitioners.

Jones, Day, Reavis & Pogue, Elwood Lui, Scott D. Bertzyk and John A. Vogt for Los Angeles County

Metropolitan Transportation Authority as Amicus Curiae on behalf of Petitioners.

James J. Cunningham; Siegel & Moreno, Lisa G. McLean and Robert D. Baker for Respondent Ronald Lauher.

William A. Herreras and Susan Silberman for California Applicants' Attorneys Association as Amicus Curiae on behalf of Respondent Ronald Lauher.

No appearance for Respondent Workers' Compensation Appeals Board.

JUDGES: (Opinion by Werdegar, J., expressing the unanimous opinion of the court.)

OPINION BY: WERDEGAR

OPINION

[*1286] [*667] [**1078] WERDEGAR, J.**

We address in this case two issues concerning the administration of the workers' compensation scheme in this state that have escaped definitive resolution. First, when an employee who has suffered an industrial injury returns to work following a determination the injury has become permanent and stationary, is the employee entitled to temporary disability indemnity (TDI) to compensate him for time off from work while pursuing continuing medical treatment for that permanent injury? Second, does an employer discriminate against the injured employee within the meaning of Labor Code [1] section 132a if it requires the employee to use sick and vacation leave when away from the workplace seeking treatment for his permanent injury? We answer both questions in the negative. [2]

FOOTNOTES

1 All further statutory references are to the Labor Code unless otherwise stated.

2 Because we find employer did not discriminate against its employee, we need not decide the third issue raised, which concerned whether the Court of Appeal improperly disregarded the factual findings made below.

FACTS

Applicant Ronald Lauher had worked as a rehabilitation counselor for petitioner Department of Rehabilitation (employer) for 25 years when he **[*1287]** submitted a **[**1079]** claim for workers' compensation benefits based on work-related stress and depression. Dr. Donald Houts submitted a report stating Lauher suffered from Gerstmann's Syndrome, i.e., a brain lesion causing Lauher to experience learning disabilities, but that he had responded to a number of medications, and his condition was permanent and stationary. Based on this medical report, Lauher entered into a stipulation with his employer and the employer's adjusting agency, State Compensation Insurance Fund (SCIF), concluding he had suffered a compensable industrial injury to his psyche causing temporary disability, and that this injury produced a permanent disability of 23 percent, compensable at $ 140 per week, to a **[***668]** total of $ 11,970. The stipulation further stated that "[t]here IS a need for medical treatment to cure or relieve from the effects of said injury. As specified in the report of Donald Houts, M.D., dated 05/12/97."

The workers' compensation judge (WCJ) thereafter accepted the stipulation and denied Lauher's additional claims for penalties under section 132a based on allegations that his supervisor had made harassing telephone calls to Lauher and his family, and that employer, before agreeing to the stipulation, had discriminated **[**1080]** against Lauher by requiring that he use accrued sick and vacation time for absences to attend medical appointments. The WCJ denied a petition for reconsideration, as did the Workers' Compensation Appeals Board (WCAB or the Board).

After agreeing to the stipulation, Lauher returned to work. He also continued to see Dr. Houts for treatment. Dr. Houts was available for appointments only during regular business hours. Lauher's round-trip journey from his office to Dr. Houts's office is 58 miles. Depending on the traffic, it took Lauher between two and one-half hours to four hours to drive to Dr. Houts's office, have a session with him, and return to Lauher's place of employment. Employer informed Lauher he would not be paid his full salary unless he took sick leave or vacation time for time spent away from his office seeing Dr. Houts. Lauher used close to 200 hours of either sick leave or vacation time to cover his medical appointments with Dr. Houts.

Lauher then filed the petition that forms the basis of this case, seeking reimbursement for the sick and vacation leave his employer docked him for time he spent seeing Dr. Houts for poststipulation treatment, as well as penalties for discrimination pursuant to section 132a. SCIF responded and explained that it had paid Lauher industrial disability leave and TDI for his period of temporary disability, but that he was not entitled to receive either benefit in the future because his industrial injury had become permanent and stationary. Because, according to the stipulation, Lauher was entitled to **[*1288]** "future medical treatment," SCIF alleged that employer "continues to provide" for such treatment and denied any discrimination: "[Employer] has not discriminated against the applicant regarding non-reinstatement/reimbursement of leave time. The Employer's policy in this regard is based on good faith business necessity and has been universally applied in industrial and non-industrial injuries."

The WCJ ruled that Lauher "established a nexus between his industrial injury and [his employer's] conduct of requiring him to take sick leave to attend doctor's appointments." Specifically, citing section 4600, the WCJ ruled that Lauher was "entitled to workers' compensation benefits in the form of medical treatment" and that includes " 'all reasonable expenses of transportation, meals and lodging' and 'one day of temporary disability indemnity for each day of wages lost. . . .' The worker's permanent and stationary status has no bearing on his entitlement to receive treatment. Labor Code § 4600 does not say that the worker will be considered temporarily disabled on the day that he goes for treatment, but it says that the worker will be entitled to receive temporary disability indemnity for each day of lost wages. If a worker goes for treatment and must miss time from work, the worker should not be assessed sick leave but, rather, should be paid at the temporary disability rate for the time lost." Further, the WCJ held employer had not established that a good faith business necessity justified docking Lauher's sick leave under these circumstances and concluded employer had unlawfully discriminated **[***669]** against Lauher. Accordingly, the WCJ ordered employer to pay a penalty of 10 percent "of the cost of all past, present and future medical treatment in this case" and also ordered employer to pay Lauher $ 10,000 for violating section 132a. The WCJ thereafter denied a petition for reconsideration; the WCAB, over one dissent, affirmed.

The Court of Appeal disagreed with the WCAB, finding Lauher had not met his burden of presenting a prima facie case of discrimination under section 132a. Accordingly, the appellate court annulled the WCAB's decision. We granted Lauher's petition for review.

DISCUSSION

A. *Background*

More than 90 years ago, our Legislature was directed to "create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party." (Cal. Const., former art. XX, § 21, added Oct. 10, 1911.) This language was modified by an **[*1289]** amendment adopted on November 5, 1918, [3] which is in the current state Constitution, as renumbered, without substantive change. (Cal. Const., art. XIV, § 4.) The Legislature complied with this directive by enacting various provisions of the Labor Code. This statutory scheme "rest[s] on the underlying notion that the common-law remedy [for industrial injuries to workers], with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of modern industry." (*Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 693 [151 P. 398]).HN1CA(1)**(1)** "[T]he theory of [the workers' compensation] legislation is that the risk of injury to workmen in the industries governed by the law should be borne by the industries, rather

than by the individual workman alone. As the ultimate result, the burden imposed in the first instance upon the employer, will, it is said, be distributed, as part of the cost of production, among the consuming public." (*Id.* at p. 694.)

FOOTNOTES

3 The 1918 amendment provided in part that the Legislature should "create, and enforce a complete system of workmen's compensation, by appropriate legislation . . . ." (Cal. Const., former art. XX, § 21, as amended Nov. 5, 1918.)

"This system attempts to assure employees of an expeditious remedy both adequate and certain, independent of any fault on the part of employees and employers. At the same time, it provides the employer with a liability which is determinable within defined limits. It represents a philosophy that industry, as a cost of doing business, should provide for the care and rehabilitation of workers disabled by work injuries. In this way, society supports the program as a[n] integral element of commerce and industry, rather than through tax-supported plans." (1 Herlick, Cal. Workers' Compensation Law (6th ed. 2001) § 1.01[4], p. 1-4.)

In creating and maintaining a system of workers' compensation, the people of this state made an important public policy decision and transformed how we address workplace injuries. It should be remembered, however, that the purpose of an award under the workers' compensation scheme " 'is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. . . . In short the **[***670]** award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public. . . . Complete protection is not afforded the employee from disability because this would constitute an invitation to malinger or to be careless on the job as he would then lose nothing in assuming a disabled **[*1290]** status.' " (*Universal City Studios, Inc. v. Worker's Comp. Appeals Bd.* (1979) 99 Cal. App. 3d 647, 660 [160 Cal. Rptr. 597].)

HN2 CA(2) **(2)** Once an injured worker is awarded compensation for an industrial injury and that award is affirmed by the Board, our review of that decision is limited. As to **[**1081]** findings of fact, we defer to the Board's findings if supported by substantial evidence. (§ 5952; [4] *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 [193 Cal. Rptr. 157, 666 P.2d 14].) While we accord " 'significant respect' " to the Board's interpretation of statutes in the area of workers' compensation (*Avalon Bay Foods v. Workers' Comp. Appeals Bd.* (1998) 18 Cal.4th 1165, 1174 [77 Cal. Rptr. 2d 552, 959 P.2d 1228] (*Avalon*)), we subject the Board's conclusions of law to de novo review (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685 [97 Cal. Rptr. 2d 638, 2 P.3d 1180]; see *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 [20 Cal. Rptr. 2d 26] ["Questions of statutory interpretation are, of course, for this court to decide"]).

FOOTNOTES

4 Section 5952 provides: HN3 "The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:

"(a) The appeals board acted without or in excess of its powers.

"(b) The order, decision, or award was procured by fraud.

"(c) The order, decision, or award was unreasonable.

"(d) The order, decision, or award was not supported by substantial evidence.

"(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

"Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to

exercise its independent judgment on the evidence."

HN4 The Legislature, by enacting section 3202, has helped frame the issue of review by an appellate court. That section provides that issues of compensation for injured workers "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Thus, " '[a]lthough the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor . . . , and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. [Citation.] *This rule is binding upon the board and this court.*' " (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280 [113 Cal. Rptr. 162, 520 P.2d 978].) Moreover, whether an employee's injury arose out of his employment is not the only question subject to this rule: "All aspects of workers' compensation law . . . are to be liberally construed in favor of the injured worker." (**[*1291]** *Save Mart Stores v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.App.4th 720, 723 [4 Cal. Rptr. 2d 597].)

With this standard of review in mind, we turn to the first issue posed in this case: Was Lauher entitled to TDI to reimburse him for wages lost while pursuing medical treatment for a permanent and stationary industrial injury?

[*671]** B. *Entitlement to TDI to Replace Wages Lost Attending Medical Appointments for Treatment of a Permanent and Stationary Injury*

CA(3a) **(3a)** Lauher contends that "as a necessary means to the end of ensuring prompt medical treatment [pursuant to section 4600], [an] employee is entitled to temporary total disability indemnity for the time lost from work while attending necessary medical treatment." As we explain, because his industrial injury had become permanent and stationary, he was no longer entitled to receive TDI.

HN5 CA(4) **(4)** Two of the types of benefits available to the worker injured on the job are temporary disability indemnity, or TDI, and permanent disability indemnity, or PDI. Although both take the form of financial benefits, "[i]t must be remembered that temporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. [Citation.] In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. [Citation.] Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. [Citation.]" (**[**1082]** *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal. App. 3d 827, 836 [168 Cal. Rptr. 884]; see also *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [285 Cal. Rptr. 86, 814 P.2d 1328].)

HN6 CA(3b) **(3b)** That TDI is intended as wage replacement is inferable from section 4653, which requires temporary total disability be calculated as "two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." Because "[t]emporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income" (*J. T. Thorp, Inc. v. Workers? Comp. Appeals Bd.* (1984) 153 Cal. App. 3d 327, 333 [200 Cal. Rptr. 219] ; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd., supra*, 34 Cal.3d at p. 168), an employer's obligation to pay TDI to an injured worker ceases when such **[*1292]** replacement income is no longer needed. Thus, the obligation to pay TDI ends when the injured employee either returns to work (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal. App. 3d 856, 868 [157 Cal. Rptr. 355]; see also § 4651.1) or is deemed able to return to work (*Bethlehem Steel Co. v. Ind. Acc. Com.* (1942) 54 Cal. App. 2d 585, 586-587 [129 P.2d 737]), or when the employee's medical condition achieves permanent and stationary status (*Industrial Indem. Exch. v. Ind. Acc. Com.* (1949) 90 Cal. App. 2d 99 [202 P.2d 850]; see generally *Kopitske v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 623, 631 [88 Cal. Rptr. 2d 216] ; *Ritchie v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1179 [29 Cal. Rptr. 2d 722]; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed., Peterson et al. edits., 2002) § 7.02[1], p. 7-7 (Hanna)).

HN7 CA(5) **(5)** By contrast, section 4650 provides that the first permanent disability payment must be made by the employer within "14 days after the date of the last payment of temporary disability indemnity." From this, we may infer the Legislature anticipates an employer has no legal obligation to pay PDI until the obligation to pay TDI has ceased. Accordingly, we held in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989] that HN8 "[t]he right to permanent disability compensation does **[***672]** not arise until the injured worker's condition becomes 'permanent and stationary.' " (*Id.* at p. 238, fn. 2.) "A disability is considered permanent after the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time." (Cal. Code Regs., tit. 8, § 10152; see *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1422, fn. 3 [118 Cal. Rptr. 2d 105]; 1 Hanna, *supra*, § 8.03, pp. 8-16 to 8-17.)

CA(3c) **(3c)** That Lauher's industrial injury was permanent and stationary is undisputed. Lauher's physician, Dr. Houts, so reported, and Lauher entered into a stipulation with SCIF to that effect. That Lauher had returned to work is also undisputed. Under these circumstances, we conclude he was not entitled to any further TDI payments to compensate him for wages lost due to his attending medical appointments during the workday. HN9 "An injured employee cannot be temporarily and permanently disabled at the same time; thus, permanent disability payments do not begin until temporary disability payments cease." (*City of Martinez v. Workers' Comp. Appeals Bd.* (2000) 85 Cal.App.4th 601, 609 [102 Cal. Rptr. 2d 588]; see also *Ritchie v. Workers' Comp. Appeals Bd., supra*, 24 Cal.App.4th at p. 1180 [same]; *New Amsterdam Cas. Co. v. Ind. Acc. Com.* (1951) 108 Cal. App. 2d 502, 507 [238 P.2d 1046] [same]; 1 Hanna, *supra*, § 7.02[1], p. 7-8 [same].) Here, Lauher had passed out of the healing period (for which TDI serves as a wage replacement) and had agreed to a stipulation compensating him for his diminished **[*1293]** ability in the workplace due to a permanent and stationary injury. Because Lauher had begun collecting PDI, he was no longer entitled to TDI.

Lauher's counterarguments are not persuasive. As did the WCJ, he first relies on section 4600, which relates generally to medical and hospital treatment for an injured worker. That section provides in pertinent part that "Medical, surgical, chiropractic, acupuncture, and hospital treatment, including **[**1083]** nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer." He contends that section 4600 should be liberally construed to include replacement of lost wages occasioned by an employee's medical treatment. Although he is correct that "[t]he Legislature intended that section 4600 shall be liberally interpreted in favor of the employee's right to obtain reimbursement" (*McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 86 [48 Cal. Rptr. 858, 410 P.2d 362]; *Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 21 Cal.App.4th 1747, 1758 [27 Cal. Rptr. 2d 93]), he is incorrect that even a liberal interpretation of section 4600 will extend so far as to authorize the payment of *temporary* disability indemnity to replace lost wages when an injury has become *permanent* and stationary.

Lauher apparently would have us analogize the right to reimbursement for sick and vacation leave used for seeking continuing treatment for a permanent and stationary industrial injury to the right to reimbursement for transportation costs. Citing *Avalon, supra*, 18 Cal.4th 1165, *Hutchinson v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 372 [257 Cal. Rptr. 240], and *Bundock v. Herndon and Finnigan* (1923) 10 I.A.C. 32, Lauher contends that because section 4600 has been construed liberally to compensate an injured worker for transportation costs associated with obtaining medical treatment, we similarly should conclude he is entitled to TDI to compensate him for wages lost while seeking **[***673]** treatment with Dr. Houts. We disagree because the two situations are not comparable. In *Avalon*, we observed that although section 4600 does not expressly refer to medical treatment transportation expenses as an aspect of medical treatment benefits, they have consistently been so regarded under the workers' compensation laws. [Citations.]" (*Avalon, supra*, at p. 1173.) "The board's practice . . . of awarding medical treatment transportation expenses," we observed, "is of long standing," noting that such benefits have been paid "[a]s early as 1923." (*Id.* at p. 1174.) No comparable precedent exists for compensating an injured employee for his wage loss once his injury becomes permanent and stationary.

Nor is Lauher's claim for TDI to offset the associated wage loss he would incur should he fail to use his sick and vacation leave during his appointments with Dr. Houts supportable as a conceptual matter. Lauher argues that **[*1294]** "[i]t necessarily [follows] that if an injured worker *loses wages*

from attending necessary and mandated . . . medical treatment, there is a resultant chilling effect on the injured worker's ability to obtain medical treatment." (Italics added.) We disagree and reiterate that although TDI is intended as a wage replacement while the injured worker is healing from his injury, once the injury becomes permanent and stationary and/or the employee returns to work, any future benefits authorized by the workers' compensation scheme are not intended as wage replacement. The worker is provided medical benefits, including reimbursement for transportation costs (*Avalon, supra,* 18 Cal.4th 1165), during the healing period in order to enable him to return to productive employment and to prevent him from becoming a public charge. Once he returns to work, in addition to the wages he earns, he is also compensated in the form of PDI for the permanent diminution of his abilities caused by his industrial injuries. CA(6) **(6)** The system of workers' compensation is not intended to provide full and total recompense for any and all consequences of a worker's injury, but instead represents a compromise between the interests of workers and those of employers. As the Court of Appeal reasoned below, quoting *Mead v. Diamond International Corporation* (1974) 39 Cal.Comp.Cases 1, 4: " '[I]n compensation practice day in and day out employees are totally uncompensated for wages lost while attending to medical treatment during their work day. It has long been considered that in exchange for that blanket coverage of compensation without regard to fault, the employee bears some of the **[**1084]** burden.' " (Quoting the trial referee in *Mead.*) We agree. [5]

FOOTNOTES

5 For the same reason, we reject the argument by amicus curiae California Applicants' Attorneys Association that, even if Lauher is not entitled to TDI in this situation, he is nonetheless entitled to some form of wage replacement using TDI as the "measure of recovery."

CA(3d) **(3d)** Although Lauher relies on specific language in section 4600 mentioning reimbursement for transportation expenses, such language applies to a specific and discrete situation not present in this case. Thus, the second paragraph of section 4600 provides in part: "*Where at the request of the employer, the employer's insurer, the administrative director, the appeals board, or a workers' compensation judge*, the employee submits to *examination* by a physician, he or she shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals, and lodging incident to reporting for the examination, *together with one day of temporary disability indemnity* **[***674]** *for each day of wages lost in submitting to the examination.*" (Italics added.) Contrary to the views of both Lauher and the WCJ below, this specific statutory benefit is not a broad obligation to pay TDI to replace an employee's wages for time away from **[*1295]** work while pursuing medical treatment for a permanent and stationary injury. Rather, this benefit is in the nature of a medical-legal benefit, reimbursing the employee for his time when requested to submit to a medical examination to resolve a compensation claim. Lauher cannot take advantage of this benefit, both because his semi-regular treatment with Dr. Houts is not undertaken at the request of one of the enumerated entities, such as his employer or SCIF, and because his appointments with Dr. Houts are for continuing treatment, not for an "examination" connected with resolving an application for benefits.

Finally, Lauher argues the Schedule of Administrative Penalties, Administrative Director Rule 10111.1 (a)(4), which is codified in California Code of Regulations, title 8, section 10111.1, subdivision (a)(4) (hereafter rule 10111.1), indicates the Legislature's intent that section 4600 be interpreted broadly enough to authorize payment of TDI to reimburse an employee for time away from work seeking medical treatment even though the employee's injury has become permanent and stationary. The Board accepted this argument as further support for awarding TDI to reimburse Lauher for time spent out of the office seeking treatment with Dr. Houts, but, with due respect to the Board, we do not.

Section 129, subdivision (a) provides in part: HN10 "To make certain that injured workers, and their dependents in the event of their death, receive promptly and accurately the full measure of compensation to which they are entitled, the administrative director shall audit insurers, self-insured employers, and third-party administrators to determine if they have met their obligations under this code." In connection with this auditing procedure, section 129.5, subdivision (a) provides in pertinent part: HN11 "The administrative director may assess an administrative penalty against an insurer, self-insured employer, or third-party administrator for [enumerated failings]." Finally, section 129.5,

subdivision (b) [HN12]requires the administrative director to "promulgate regulations establishing a schedule of violations and the amount of the administrative penalty to be imposed for each type of violation."

Pursuant to this legislative delegation, the Labor Department's administrative director promulgated rule 10111.1(a)(4). That provision sets forth a schedule of graduated financial penalties for failures to pay enumerated benefits. In particular, rule 10111.1(a)(4) provides: [HN13]"The penalty for each failure to pay mileage fees and bridge tolls when notifying the employee of a medical evaluation scheduled by the claims administrator, in accordance with Labor Code Sections 4600 through 4621; or to pay mileage fees and bridge tolls within 14 days of receiving notice of a medical evaluation **[*1296]** scheduled by the administrative director or the appeals board; or to object or pay the injured worker for any other transportation, *temporary disability*, meal or lodging expense *incurred to obtain medical treatment* or evaluation, within 60 days of receiving a request, is: [P] $ 25 for $ 10 or less in expense; [P] $ 50 for more than **[**1085]** $ 10, to $ 50, in expense; [P] $ 75 for more than $ 50, to $ 100, in expense; [P] $ 100 for more than $ 100 in expense." (Italics added.)

Lauher contends this administrative rule, with its specific mention of "temporary disability," supports his view that the Legislature intended section 4600 be interpreted to authorize the payment of TDI as **[***675]** a replacement for wages an employee loses while pursuing medical treatment for an industrial injury that has become permanent and stationary. No basis for such a conclusion exists. Read as a whole, rule 10111.1(a) addresses several distinct situations. For example, rule 10111.1(a)(1) addresses the failure to pay the self-imposed penalty for a late indemnity payment pursuant to section 4650, subdivision (d). Rule 10111.1(a)(2) addresses the failure to begin paying permanent disability indemnity in a timely fashion. Rule 10111.1(a)(3) addresses the failure timely to reimburse a worker for self-procured medical treatment.

At issue here is rule 10111.1(a)(4). That subsection addresses the failure to pay transportation and associated costs in certain enumerated situations. Thus, it first prescribes an administrative penalty for failing to pay mileage and tolls "when notifying the employee of a medical *evaluation* scheduled by the claims administrator." (Italics added.) Such an evaluation would typically occur during the healing period when a worker would claim entitlement to TDI, but it could also occur at other times, for example, when the employee's ability to return to work is undisputed but disagreement exists over the degree of the permanent injury, in which case further medical evaluations may be necessary. [HN14]Nevertheless, although Labor Code section 4600 specifically provides for payment of transportation expenses and temporary disability when the evaluation is performed at the request of, for example, the employer or the employer's insurer, neither this clause of rule 10111.1(a)(4) nor Labor Code section 4600 authorizes TDI or wage replacement where, as here, an employee seeks medical treatment for a permanent injury.

The second clause of rule 10111.1(a)(4), which sets forth the administrative penalty for failure to pay mileage and tolls "within 14 days of receiving notice of a medical evaluation scheduled by the administrative director," similarly fails to mention wage replacement. Here, too, the medical evaluation referred to would typically occur during the healing period to determine **[*1297]** the nature and extent of a worker's injury in connection with an application for benefits. In the less frequent situation of a medical evaluation conducted after an injury is permanent and stationary, the requirement that the evaluation be "scheduled by the administrative director" would bring the case within the specific language of Labor Code section 4600, which provides for payment of transportation expenses and TDI when submitting to an "examination" at the "request" of "the administrative director." Again, there is no mention in this clause of TDI or wage replacement where the employee seeks medical treatment on his own.

[HN15]Finally, rule 10111.1(a)(4) prescribes a penalty for the "failure . . . to object or pay the injured worker for any other transportation, temporary disability, meal or lodging expense incurred to obtain medical *treatment* or *evaluation*, within 60 days of receiving a request." (Italics added.) This clause of rule 10111.1(a)(4) differs from the first two clauses in two respects. First, unlike the two previous clauses, this clause refers to both "treatment" and " evaluation." Second, it specifically mentions "temporary disability." Although the mention of "treatment" could refer to medical care after a worker's industrial injury becomes permanent and stationary, it seems unlikely the administrative director, exercising delegated legislative powers, intended to authorize payment of TDI to replace wages an employee loses while pursuing medical treatment for a permanent and stationary injury,

absent any statutory authorization for such a benefit. Moreover, the mere mention of "temporary disability" in rule 10111.1(a)(4) is insufficient to create a benefit untethered **[***676]** to any statutory authorization. In short, rule 10111.1(a)(4) does not speak at all to the question whether an injured worker is entitled to TDI to compensate him for wages lost while seeking **[**1086]** medical treatment *once his injury has become permanent and stationary* .

In sum, HN16 we find no authority for the proposition that an injured worker is entitled to payment of TDI to reimburse him for wages lost while pursuing medical treatment for an industrial injury once that injury has become permanent and stationary. On the contrary, once the employee's injury is permanent and stationary and, as here, the employee returns to work, he is no longer entitled to TDI. Exercising independent review on this legal question (*Barnes v. Workers' Comp. Appeals Bd., supra,* 23 Cal.4th at p. 685), we find the Board erred in ruling otherwise.

C. *Discrimination Pursuant to Section 132a*

CA(7a) **(7a)** Lauher next claims that his employer discriminated against him within the meaning of section 132a because he had suffered an industrial **[*1298]** injury. This discrimination, he claims, took the form of his employer's insistence that he use his accumulated sick and vacation leave for the time he was out of the office seeing Dr. Houts for treatment of his injury Lauher claims he was thus "treated differently than other employees who had not sustained a work-related injury . . . ." [6]

FOOTNOTES

6 Although Lauher argued in the Court of Appeal that this discrimination also took the form of failure to pay him TDI for his time away from work seeing Dr. Houts, it does not appear he has renewed that claim in this court. In any event, as we find he was not entitled to TDI once his industrial injury became permanent and stationary, SCIF cannot be found to have discriminated against him by failing to pay TDI in this circumstance.

Section 132a provides: HN17 "It is the declared policy of this state that there should not be **[**1087]** discrimination against workers who are injured in the course and scope of their employment. [P] (1) Any employer who discharges, or threatens to discharge, *or in any manner discriminates* against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($ 10,000), together with costs and expenses not in excess of two hundred fifty dollars ($ 250). Any such employee shall also be entitled to reinstatement and *reimbursement* for lost wages and *work benefits* caused by the acts of the employer." (Italics added.) No criminal penalty is at issue in this case; we address only the Board's imposition of a $ 10,000 administrative penalty on Lauher's employer.

HN18 CA(8) **(8)** "[T]o warrant an award [pursuant to section 132a] the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer." (*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1386 [28 Cal. Rptr. 2d 30].) The employee must establish discrimination by a preponderance of the evidence (*Western Electric Co.v. Workers' Comp. Appeals Bd.* (1979) 99 Cal. App. 3d 629, 640 [160 Cal. Rptr. 436]), at which point the burden shifts to the employer to establish an affirmative defense (*Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal. App. 3d 524, 531 [266 Cal. Rptr. 503]). Although we defer to the Board's determination of facts if supported by substantial evidence, we review the Board's legal decisions de novo, for "[i]t is for the court to decide whether the facts found by the Board constitute a **[***677]** violation of section 132a." (*Id.* at pp. 530-531.)

CA(7b) **(7b)** To decide the merits of Lauher's claim, we must decide what section 132a means when it refers to "discrimination." As one appellate **[*1299]** court has noted, "[n]either the Legislature nor the courts have fashioned a clear rule for distinguishing those forms of discrimination which are actionable under section 132a and those forms which are not." (*Smith v. Workers' Comp. Appeals Bd.* (1984) 152 Cal. App. 3d 1104, 1108 [199 Cal. Rptr. 881] (*Smith*).) Nevertheless, some boundary

markers have been delineated. HN19 Under its express terms, an employer may not "discharge[], or threaten[] to discharge" an employee because, like Lauher, he has filed a claim for compensation. Moreover, citing the prefatory statement that "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment" (§ 132a), we have explained that the type of discriminatory actions subject to penalty under section 132a is not limited to those enumerated in the statute. Instead, we have interpreted section 132a liberally to achieve the goal of preventing discrimination against workers injured on the job. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 666-669 [150 Cal. Rptr. 250, 586 P.2d 564].) We immediately cautioned, however, that "[s]ection 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (*Id.* at p. 667.)

Noting this last passage, the court in *Smith, supra*, 152 Cal. App. 3d 1104, held that "save for the two exceptions just described [i.e., reemploying employees who are unqualified or for whom no position is available], action *which works to the detriment of the employee* because of an injury is unlawful under section 132a." (*Id.* at p. 1109, italics added.) This test of "detriment" to the employee was accepted as the applicable standard in *Barns v. Workers' Comp. Appeals Bd., supra*, 216 Cal. App. 3d at page 531 ("a worker proves a violation of section 132a by showing that as the result of an industrial injury, the employer engaged in conduct detrimental to the worker") as well as by at least one commentator (1 Hanna, *supra*, § 10.11[1], p. 10-20 ["[t]he critical question is whether the employer's action caused detriment to an industrially-injured employee"]).

The Court of Appeal in this case, however, found the *Smith* formulation "analytically incomplete." The court explained that, although Lauher had clearly suffered a detriment by having to use his accumulated sick leave and vacation time for his visits to see Dr. Houts, he never established he "had a legal *right* to receive TDI and retain his accrued sick leave and vacation time, and that [his employer] had a corresponding legal *duty* to pay TDI and **[*1300]** refrain from docking the sick leave and vacation time." [7] Thus, said the court, "[t]o meet the burden of presenting a prima facie claim of unlawful discrimination in violation of section 132a, it is insufficient that the industrially injured worker show only that . . . he or she suffered some adverse result as a consequence of some action or inaction by the employer that was triggered by the industrial injury. The claimant must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty **[***678]** to provide or refrain from taking away that benefit or status."

FOOTNOTES

[7] As noted, *ante*, Lauher no longer claims he is entitled to a penalty under section 132a due to his employer's failure to pay TDI.

We agree that for Lauher merely to show he suffered an industrial injury and that he suffered some detrimental consequences as a result is insufficient to establish a prima facie case of discrimination within the meaning of section 132a. As we explained, *ante*, our system of workers' compensation does not provide a make-whole remedy. CA(9) **(9)** "The Workers' Compensation Law is intended to award compensation for *disability* incurred in employment. 'The purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability.' " (*Universal City Studios, Inc. v. Worker's Comp. Appeals Bd., supra*, 99 Cal. App. 3d at pp. 659-660.) "The purpose of workmen's compensation is to rehabilitate, not to indemnify, and its intent is limited to assuring the injured workman subsistence while he is unable to work and to effectuate his speedy rehabilitation and reentry into the labor market." (*Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal. App. 2d 587, 600 [30 Cal. Rptr. 407].) Consistent with this view, for example, section 4653 provides that payment for temporary total disability is only "two-thirds of the average weekly earnings during the period of such disability."

HN20 CA(7c) **(7c)** An employer thus does not necessarily engage in "discrimination" prohibited by section 132a **[**1088]** merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting "discrimination" in section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer

disadvantages not visited on other employees because the employee was injured or had made a claim.

Lauher claims he was subjected to discrimination within the meaning of section 132a because he "was treated differently than other employees who had not sustained a work-related injury and were not under the mandates of **[*1301]** the Labor Code." He claims "[t]he employer's actions were directly related to the work injury and the resultant time the injured employee had to miss from work because of the medical appointments to cure or relieve the effects of the work injury." Lauher's argument fails to appreciate that, although his injury was industrial, nothing suggests his employer *singled him out for disadvantageous treatment because of the industrial nature of his injury*. We assume that employees with nonindustrial injuries must follow the same rule and use their sick leave when away from the office attending medical treatment. Certainly nothing Lauher alleges suggests otherwise. For example, he does not allege he alone is being singled out for the requirement that he use his sick leave, or that other employees are permitted to leave the office for medical appointments related to nonindustrial injuries and are not required to use their sick leave.

Because Lauher does not allege that other employees are permitted to be away from their workplace for medical care yet need not use their sick leave if they wish to be paid their full salaries, we conclude Lauher fails to demonstrate he was the victim of discrimination within the meaning of section 132a. To hold otherwise would elevate those who had suffered industrial injuries to a point where they enjoyed rights superior to those of their coworkers. Nothing in the history or meaning of section 132as antidiscrimination rule supports such an interpretation. [8]

FOOTNOTES

[8] Because we find Lauher failed to establish a prima facie case of discrimination within the meaning of section 132a, we need not address SCIF's contention that employer had a legitimate business reason for requiring Lauher to use his sick leave and vacation time when away from the office seeing Dr. Houts for treatment. For the same reason, we also decline to address the argument by amicus curiae California Employment Law Council that we should reexamine and discard the holding of *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, 22 Cal.3d 658, that section 132a should be liberally construed in favor of injured workers. We also decline to address the invitation to reinterpret section 132a to require proof of discriminatory intent. These arguments are not necessary to resolve the present matter and, in any event, were not raised by any party or amicus curiae before the WCJ, the WCAB, or the Court of Appeal.

CONCLUSION

The decision of the Court of Appeal annulling the decision of the Board is affirmed.

George, C. J., Kennard, J., Baxter, J., Chin, J., Brown, J., and Moreno, J., concurred.